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7 **BEFORE THE VICTIM COMPENSATION AND GOVERNMENT CLAIMS BOARD**
8 **OF THE STATE OF CALIFORNIA**
9

10 In the Matter of the Application of:

11 **E.M.**

12 Application No. 737837
13

Precedent Decision No. 04-04

14 **Introduction**

15 A hearing on this application was held on October 14, 2003, in Bakersfield, California, by
16 Richard P. Fisher, Hearing Officer, California Victim Compensation and Government Claims Board
17 (Board). E.M. appeared at the hearing and testified under oath. The hearing was closed to the public
18 pursuant to Government Code section 13963.1. E.M. also appeared and testified under oath during
19 additional closed telephone hearings on March 12 and March 15, 2004, in Sacramento, California.

20 **Procedural Background**

21 E.M. filed her application on July 9, 2002¹, in connection with a June 2, 1995 domestic violence
22 and child endangerment incident involving her son, daughter-in-law, and grandson. The application
23 seeks compensation for mental health counseling expenses for E.M. and for her grandson, B.M.² Board
24 staff recommended the denial of the application because E.M. did not appear to be a qualifying
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26 ¹ Because the application was filed before the effective date of the current statute, Statutes 2002, chapter 1141 (Senate Bill
27 1423, Chesbro), all references are to the Government Code sections in effect on or before December 31, 2002.

28 ² B.M.'s (date of birth: September 28, 1993) original application (No. 465527) was filed by his mother, C.M., and accepted
29 as an eligible claim on July 1, 1997. An additional application (No. 737796) filed on his behalf on July 9, 2002, by E.M. was
rejected by staff as a duplicate claim.

1 derivative victim under the applicable law. E.M.'s application also appeared to be late because it also
2 was filed well beyond the applicable one-year filing period.

3 **Statement of Issues**

- 4 1. Does good cause exist for E.M.'s late filing of her application?
- 5 2. If so, is there a preponderance of evidence establishing that E.M. is an eligible derivative victim
6 of the June 2, 1995 qualifying crime?

7 **Findings of Fact**

8 The documentary evidence in the Board's file and the testimony of E.M. establish that B.M.
9 was born on September 28, 1993. For seven of the first thirteen months of his life, B.M. resided with
10 E.M., his biological grandmother. At all other times relevant to this appeal, B.M. lived with his
11 biological parents, C.M. and W.M.

12 On June 2, 1995, E.M. was visiting C.M. and W.M. at their home in Bakersfield, California.
13 On the evening of June 2, 1995, E.M. returned home from a walk. When she arrived at the front door,
14 she heard C.M. and W.M. arguing. She testified that she heard C.M. state that C.M. was going to
15 shoot W.M. W.M. reportedly said, "Go ahead, I don't care." She entered the house and saw C.M. and
16 W.M. physically struggling in the bedroom. She then heard a single gun shot but could see that
17 neither C.M. nor W.M. had been shot. C.M. exited the bedroom and walked past E.M. She was
18 carrying a handgun. E.M. testified that she was never threatened with the gun but that the arguing and
19 the sound of the gun firing had made her very agitated. She also stated that she was not present in the
20 back bedroom during the argument and that she had not witnessed the events leading to the gun being
21 fired.

22 E.M. further testified that during the argument between C.M. and W.M., B.M. had not been
23 present to the altercation but had been in a separate room the entire time. It is clear from E.M.'s
24 testimony that because B.M. was in a separate room at the other end of the home, he had not seen his
25 parents arguing nor was he aware that a gun had been fired. In regard to his awareness level, it is
26 pertinent to note that B.M. was 20-months-old at the time of the June 2, 1995 crime.

27 According to the police report, it could not be determined whether or not the gun had been
28 fired deliberately. C.M. told police that W.M. had intentionally fired the gun in order to intimidate
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1 her. However, W.M. told the responding officers that the gun had gone off accidentally during the
2 argument. Contrary to the police report, E.M. testified that it had been C.M. who had the gun and that
3 she had threatened to shoot W.M. Therefore, the evidence in the record is inconclusive regarding who
4 had the gun, who had fired the gun, and what was the intent behind the firing of the gun.

5 On June 6, 1995, W.M. pled no contest to misdemeanor counts of recklessly discharging a
6 firearm and child endangerment. E.M. testified that C.M. had been declared mentally disabled by the
7 Social Security Administration several months prior to the crime and had deep emotional and
8 psychological problems. E.M. stated that C.M. had discharged the firearm and that it had gone off
9 accidentally when W.M. had tried to take the gun from her. She further testified that W.M. pled no
10 contest to the firearm charge simply because he did not wish to expose C.M.'s mental health problems
11 in public. E.M. testified that she herself was never threatened with physical injury during the incident
12 but that she was very upset about hearing the gunshot in the midst of the argument because she was
13 aware of C.M.'s mental instability.

14 After the June 2, 1995, incident, E.M. took the necessary legal steps to obtain legal custody of
15 B.M. The court order transferring legal custody of B.M. to E.M. was issued on December 8, 1995.
16 E.M. filed her application for program compensation on July 9, 2002. She testified that the seven (7)
17 year delay from the date of the crime to the date she filed her application is attributable solely to the
18 fact that she did not know about the program until May 2002. E.M. stated that she would have filed
19 her application sooner but the various mental health providers from whom she received counseling
20 never informed her about the program. E.M. offered no other explanation for the late filing of her
21 application.

22 Based on the testimony of E.M. during the hearing and on the documentary evidence contained
23 in the Board's file, substantial evidence supports each of the following findings of fact:

- 24 1. E.M. witnessed a domestic violence and child endangerment qualifying crime involving B.M.,
25 C.M., and W.M. on June 2, 1995.
- 26 2. E.M. was not physically injured or threatened with physical injury during the qualifying crime.
- 27 3. E.M. filed her application on July 9, 2002—more than seven years after the qualifying crime.

1 4. The sole reason given by E.M. for the late filing of her application was that she did not have
2 actual knowledge of the program until May 2002.

3 **Determination of Issues**

4 The Board shall approve an application for assistance if a preponderance of the evidence shows
5 that as a direct result of a crime the victim incurred an injury that resulted in a pecuniary loss.
6 (Gov. Code, § 13964(a)³.) A “qualifying crime” is defined as a crime that results in injury to the victim,
7 threat of injury to the victim, or death to the victim. (Cal. Code Regs., tit. 2, § 649(a)(18)⁴.) E.M. has
8 the burden of proof on all issues necessary to establish her eligibility for program compensation. (Gov.
9 Code, § 13964(a); Reg., § 647.32.)

10 The first issue in this appeal concerns the application of controlling law. With the exception of
11 applications filed on or after January 1, 2003, the substantive law governing applications is determined
12 by the date of the crime. (See Reg., § 650.1(b); cf. Gov. Code, § 13959(d).) It is well established under
13 the program that a substantive change to eligibility shall be applied only prospectively to qualifying
14 crimes that occur on or after the effective date of the substantive change. (Reg., § 650.1(b).) Based on
15 Finding of Fact No. 1, it is determined that the program’s 1995 statutory provisions govern the current
16 appeal and that E.M. is a derivative victim under the program because in 1995 she was a family member
17 of the victim (B.M.) and she witnessed the qualifying crime. Therefore, the next issue for determination
18 is whether E.M. timely filed her application.

19 Applications for compensation under the program must be filed within one year of the date of the
20 crime. (Gov. Code, § 13961.)⁵ However, the Board may, for good cause, grant an extension of the one-
21 year filing not to exceed three years after the date of the crime. (Gov. Code, § 13961(c).) Finding of
22 Fact No. 3 establishes, and it is determined, that E.M. filed her application beyond the one-year filing
23 period of Government Code section 13961(c). The remaining question, therefore, is whether good cause
24 exists to excuse E.M.’s late filing.

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³ All statutory citations are to the 1995 Government Code provisions that govern E.M.’s application.

28 ⁴ All regulation citations are to the California Code of Regulations, title 2.

29 ⁵ The tolling provision benefiting derivative victims based on accepted applications by victims of the same qualifying crime does not apply to applications based on 1995 qualifying crimes. (See Gov. Code, § 13961(d).)

1 A preponderance of the evidence establishes that E.M. has failed to demonstrate the existence of
2 good cause for the late filing of her application. The documentary and testimonial evidence indicates
3 that the late filing is solely attributable to E.M.'s lack of knowledge concerning the existence of the
4 program. Here, E.M. testified that she did not learn of the program for more than seven years after the
5 qualifying crime. However, such lack of knowledge, standing alone, is not enough to qualify as good
6 cause within the meaning of Government Code section 13961. And none of the statutory bases for filing
7 beyond the one-year period are applicable to E.M.'s case. (See e.g., Gov. Code, §§ 13961.01 and
8 13961.05.) Good cause requires more than mere lack of knowledge of the program, especially when, as
9 here, the passage of time is so great. It is therefore determined that E.M. has failed to establish the
10 existence of good cause for filing her application beyond the one-year period established in Government
11 Code section 13961(c).

12 **Order**

13 The application is denied. E.M. is not eligible for program assistance.
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16 Date: March 15, 2004
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Notice of Decision

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12 On May 14, 2004, the California Victim Compensation and Government Claims Board adopted
13 the attached decision as Precedent Decision 04-04.
14

15 Date: May _____, 2004

16 _____
17 JUDITH A. KOPEC
18 Chief Counsel
19 California Victim Compensation and
20 Government Claims Board
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